IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

SCOTT B. PHILLIPS, SR. PLAINTIFF

v. CIVIL ACTION NO. 2:97CV139-D-A

REED'S SUPERMARKET, INC. DEFENDANT

MEMORANDUM OPINION

Presently before the court is the motion of the defendant, Reed's Supermarket, Inc. (hereinafter "Reed's") for the entry of summary judgment on its behalf with regard to the claims of the plaintiff against it. Plaintiff, Scott B. Phillips, filed this action against the defendant alleging claims arising under both the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA"). Finding that the motion is not well taken, the court shall deny the motion.

I . Factual Background

The plaintiff, Scott B. Phillips, was employed by the defendant for approximately seventeen (17) years in the defendant's meat department as a meat cutter and the meat market manager. Donald Oxner was the store manager and Phillips' direct supervisor. (Dep. of Scott Phillips at 7-8, 10.) Phillips' job performance was "real good" until Phillips had a three-week leave of absence in December 1995 for an undisclosed illness. (Dep. of Donald Oxner at 30, 80). Although no medical evidence has been provided that explicitly states what happened to Phillips, it is believed that he suffered a stroke in December 1995, as evidenced by the sagging, residual

effect on his facial muscles and the way he walked in such a slow, deliberate manner . (Oxner Dep. at 77; Phillips Dep. at 12 & Sharon Phillips Affidavit). During Phillips' illness, Oxner and the store owner, Michael Reed, visited Phillips at home and noticed these particular changes in Phillips' physical appearance. (Oxner Dep. at 15, 23, 77).

Phillips returned to work and continued in his same job duties. (Phillips Dep. at 12). On September 23, 1996, Oxner hired a younger man by almost twenty years, Bob Evans, and advised Phillips that Evans was to be his "helper." (Oxner Dep. 69-72). Phillips trained Evans during his first day on the job, and at the end of the day, Phillips was fired by Oxner. Oxner told Phillips, "the Reeds say I have to let you go." (Scott Phillips Affidavit, ¶ 7.). Oxner immediately replaced Phillips with Bob Evans. (Oxner Dep. at 21). Phillips never received any write-ups, warnings, or complaints pertaining to his job performance. He had never been counseled or advised that his job was in jeopardy. (Phillips Dep. at 10; Phillips Affidavit, ¶ 5.).

Phillips applied for unemployment benefits. During the process of obtaining his unemployment benefits, the MESC Claims Examiner asked Phillips why he was fired, and Phillips replied that he was not given a reason. The claims examiner then contacted Oxner. The examiner called Phillips later and said, "I talked to Mr. Oxner and he said that he let you go because you had a stroke." (Phillips Dep. at 18.) Oxner further indicated to the claims examiner that Phillips had not been guilty of any misconduct that led to his termination, but "claimant had a stroke last Spring and does not think he has fully recovered . . ." (Phillips Exhibit A). Attached as Exhibit A to Phillips' response to this summary judgment motion is a certified document from MESC which reveals that Oxner was interviewed by the commission. The

statement attributed to the employer includes the following, "Claimant had a stroke last spring and does not think he has fully recovered, because ever since the stroke, the market has gone down hill." (Phillips' Exhibit A).

II. Summary Judgement Standard

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden rests upon the party seeking summary judgment to show to the district court that an absence of evidence exists in the non-moving party's case. Celotex Corp. V. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed. 2d 265 (1986); See Jackson v. Widnall, 99 F. 3d 710, 713 (5th Cir. 1996); Hirras v. Nat'l R.R. Passenger Corp., 95 F.3d 396, 399 (5th Cir. 1996). Once such a showing is presented by the moving party, the burden shifts to the non-moving party to demonstrate, by specific facts, that a genuine issue of material fact exists. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed. 2d 202 (1986); Texas Manufactured Housing Ass'n, Inc. v. City of Nederland, 101 F.3d 1095, 1099 (5th Cir. 1996); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). Substantive law will determine what is considered material. Anderson, 477 U.S. at 248; See Nichols v. Loral Vought Sus. Corp., 81 F.3d 38, 40 (5th Cir. 1996). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson, 477 U.S. at 248; See City of Nederland, 101 F.3d at 1099. Further,

"[w]here the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Anderson, 477 U.S. at 248; See City of Nederland, 101 F.3d at 1099. Finally, all facts are considered in favor of the non-moving party, including all reasonable inferences therefrom. See Anderson, 477 U.S. at 254; Banc One Capital Partners Corp. V. Kneipper, 67 F.3d 1187, 1198 (5th Cir. 1995). However, this is so only when there is "an actual controversy, that is, when both parties have submitted evidence of contradictory facts." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994); Guillory v. Domtar Industries Inc., 95 F.3d 1320, 1326 (5th Cir. 1996). In the absence of proof, the court does not "assume that the nonmoving party could or would prove the necessary facts." Little, 37 F. 3d at 1075 (emphasis omitted).

III. Age Discrimination in Employment Act

The Age Discrimination in Employment Act ("ADEA") makes it "unlawful for an employer . . . to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1) (1988). "At the summary judgment stage, plaintiff need not present a prima facie case of discrimination, but must simply raise a genuine issue of material fact as to the existence of a prima facie case." Dandridge v. Chromcraft Corp., 914 F. Supp. 1396, 1402 (N.D. Miss. 1996). To demonstrate a prima facie case of age discrimination under ADEA, Phillips can show: 1) he was over the age of forty at the time of the adverse employment decision, 2) he was qualified for his job, 3) there was an adverse employment decision, and 4) he was replaced with someone younger. O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311, 116 S.Ct. 1307, 1310 (1996); Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993).

Defendant argues that Phillips cannot meet the third and forth prongs of a prima case. Defendant argues that plaintiff was not terminated by Reed's and in fact admits that he was offered another position with Reed's. The defendant argues that because Phillips was offered a job as third man in the meat market or a job in the store as a stock clerk, there exists no adverse employment decision. This Court is not persuaded. According to Oxner, the store manager, either position would have resulted in a substantial cut in pay as well as loss of job status and authority. (Oxner Dep. at 18-20, 73). This same argument has been recently rejected by the Fifth Circuit Court of Appeals. See Joe F. Boehms v. Craven Crowell et al., No. 97-600030 (5th Cir. April 15, 1998)(intention of ADEA is to protect older employees from employment decisions "which are unlawfully motivated.")(citing Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1508 (5th Cir. 1988)). Therefore, the third prong is met. In reference to the fourth prong, Phillips was 60 years of age at the time he left Reed's, and Evans was somewhere in his early forties. There exists almost twenty years difference in their ages. These are sufficient facts to establish a prima facie claim of age discrimination.

"[T]o establish a prima facie case, [Phillips] need only make a very minimal showing." Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 639 (5th Cir. 1985). As stated earlier, at this stage of the proceedings, plaintiff need only raise a genuine issue of material fact as to the existence of a prima facie case. Dandridge, 914 F. Supp. at 1402.

Once the plaintiff proves his prima facie case by the preponderance of the evidence, the burden of production then shifts to the defendant to proffer a legitimate, nondiscriminatory reason for the challenged employment action. McDonnell-Douglas Corp. v. Green, 411 U.S.

792, 802, 93 S.Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973). The defendant may overcome this burden by providing evidence that, "if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 2747, 125 L.Ed2d 407 (1993).

If the defendant meets its burden, the presumption raised by the plaintiff's prima facie case disappears. However, the plaintiff is then given the opportunity to demonstrate that the defendant's articulated rationale was merely a pretext for discrimination. St. Mary's Honor Center, 509 U.S. at 508. Once an age discrimination case reaches the pretext stage, it should be treated like any other civil case. That is, "a court must examine both circumstantial and direct evidence in deciding the sufficiency of the evidence to support a jury determination that the employer used age as a determinative factor in making the employment decision." Rhodes, 75 F.3d at 993-94.

In Rhodes, the Fifth Circuit plainly sets forth what is needed for a plaintiff to withstand a motion for summary judgment:

> [A] jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains. The employer, of course, will be entitled to summary judgment if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory.

Id. at 994.

Evidence of pretext will sometimes permit the trier of fact to infer intentional discrimination:

> The factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required . . ."

Hicks, 509 U.S. at 511, 113 S.Ct. at 2749.

In the case at hand, the defendant argues that its decision to terminate Phillips was justified based on the following reasons: 1) Phillips failed to check the prices of the competitors, 2) Phillips ordered too much inventory, and 3) Phillips refused to comply with Reed's instructions that he purchase meat from a co-op wholesaler in order to obtain the lowest price.

When asked about Phillips' failing to check the prices of the local competitors, Oxner discussed Phillips' and another employee, Ronnie Gates' actions:

> Q. Now, he [Phillips] and the second man wouldn't have both been supposed to go at the same time, were they?
>
> A. Well, they kind of worked together and everything and they [sic] were asked to go check it.
>
> Q. And I don't know whether you said this is what they were asked to do or what they did. I think you said generally they would go about once a week to check prices?
>
> A. They never did go and check until, you know, we really got down to it, and it is just about nearly was a rough situation of getting them to go.
>
> Q. I believe, if I am not mistaken, I believe you said the second man, and I believe you said that was Ronnie Gates, refused to go check prices and actually quit because he wouldn't do that?

A. Right.

Oxner's Dep. at 51. Ronnie Gates, however, was allowed to return to work approximately two or three weeks after he quit. This fact alone establishes evidence of disparate treatment. It is the court opinion that a fact issue is created as to whether this stated reason was what actually motivated Reed's actions.

Defendant argues that another reason Phillips was terminated was because he kept too much inventory on hand. Oxner testified as follows:

> Q. How do you decide if the inventory is too high or too low or just right?
>
> A. Well, after you have been around a while there, you know what you, generally how much you sell weekly. And then say you buy a case of hams and you don't sell them that week, and you need to go to the freezer with the, and you know, keep them froze to keep from losing them. So, it could be put in the freezer . .
>
> Q. Did you have any problems with Mr. Phillips as far as purchasing too much meat?
>
> A. <u>At times there was a little too much bought. It's hard to judge what you are going to, you know, sell</u>.

Oxner Dep. at 11-12.

Oxner himself states that it is difficult to reach the objective of having the proper amount of meat on hand without any remaining inventory. Phillips never received any complaints concerning inventory control.

The defendant's third reason for Phillips' termination was that he sometimes purchased meat from certain suppliers who did not have the lowest prices. At the time of Phillips' termination, he was purchasing stock from suppliers in the same manner as he had for the

previous 17 years. Phillips stated that he never was specifically told where to purchase the meat but knew the store's overall objective was to buy the cheapest price it could get. Again, no proof exists as to any write-ups or reprimands. In his deposition, Oxner admitted the following:

> Q. That wasn't why you fired him, just because on that occasion that he bought some beef rounds at a higher price than he could have gotten them form somewhere else?
>
> A. No, sir.
>
> Q. That wouldn't have really been what you would have thought would have been a firing offense to do that?
>
> A. Unh-unh.

Oxner Dep. at 42.

Defendant argues that Phillips committed these acts of misconduct. However, Oxner revealed to the MESC that Phillips had done nothing that constituted misconduct. Particularly, the statement reads in part, " No certain thing happened to cause his discharge. . . No misconduct was involved." (Phillips Exhibit A).

It is the opinion of the court that the facts at hand are sufficient to create a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and a reasonable inference that age was a determinative factor in the actions of which Phillips complains.

IV. Americans with Disability Act

An employer may not discriminate against an employee based on his disability. 42 U.S.C. § 12101, et seq. "The ADA prohibits discrimination against a qualified individual with a disability because of the disability of such individual in regard to . . .discharge of employees . . .

and other terms, conditions, and privileges of employment." Daigle v. Liberty Life Insurance Co., 70 F.3d 394, 396 (5th Cir. 1995); see 42 U.S.C. § 12112 (a). To establish a prima facie case of discrimination based on a disability, Phillips must show:

> (1) that he suffers from a disability;
>
> (2) that he was qualified for the position;
>
> (3) that he suffered an adverse employment action because of his disability; and
>
> (4) that he was replaced by a non-disabled person or was treated less favorably than non-disabled employees.

Daigle, 70 F.3d at 396; see Norris v. Hartmarx Specialty Stores, Inc., 913 F.2d 253, 254 (5th Cir 1990). Sufficient facts exist in the record to meet the last three elements of this test and need not be discussed further. To meet the first element, Phillips must show that he has a disability. The Americans with Disabilities Act ("ADA") defines a disability as:

> (1) A physical or mental impairment that substantially limits on or more of the major life activities of such individual;
>
> (2) a record of such an impairment; or
>
> (3) being regarded as having such an impairment.

42 U.S.C. § 12102 (2).

Phillips testified that he is not disabled and further testified that there are no major life functions that he is unable to perform. (Phillips' Exhibit A). The question then is whether the plaintiff was regarded as having such an impairment.

Oxner testified that Phillips' job performance changed. Specifically, he stated:

> Q. Mr. Oxner, you felt like, whether it was a stroke or some other physical ailment, you felt like he had had something that he was now disabled from doing his job at the store, did you not, sir?
>
> A. Something had happened to him. You know, like I said, I don't know what it was, but his performance back there in the market just wasn't up to par.
>
> Q. Of course, I understand all you can say is what you felt, but it was your feeling that because something had happened to him and he was no longer able to do his job?
>
> A. Right.

Oxner Dep. at 79. This statement correlates with what Oxner told the claims examiner with the MESC. He told the claims examiner, "claimant had a stroke last spring and does not thing he has fully recovered, because ever since the stroke, the market has gone down hill." Phillips' Exhibit A. It is the opinion of this court that a reasonable question exists as to whether Phillips' employer perceived him as being disabled.

A plaintiff may prove a claim of disability discrimination by presenting direct evidence of discrimination. Absent direct proof of discrimination, the indirect method of proof as discussed in the above section of this opinion may be utilized. See McDonnell Douglas Corp. v, Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L.Ed2d 668 (1973). However, here the issue of circumstantial evidence need not be addressed with the facts at hand. The undersigned is of the opinion that direct evidence is present to create a fact issue as to whether discrimination occurred.

After careful consideration of the matter at bar, the undersigned is of the opinion that the defendants' motion for summary judgment should be denied and that the plaintiff's claims

should proceed to trial.

A separate order in accordance with this opinion shall issue this day.

This the ____ day of July 1998.

United States District Judge

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v. CIVIL ACTION NO. 2:97CV139-D-A

REED'S SUPERMARKET, INC. DEFENDANT

ORDER DENYING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT the motion of the defendants for the entry of summary judgment as to Plaintiff's federal claims is hereby DENIED.

SO ORDERED, this the ____ day of July 1998.

United States District Judge